

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-3076, 16-3570

Caption [use short title] _____

Motion for: Requesting Judicial Notice and

Novelis Corporation,

Declaration of Kenneth L. Wagner in Support

Petitioner-Cross Respondent

Of Intervenor USW Motion Requesting Judicial Notice

. v.

National Labor Relations Board

Respondent, Cross Petitioner

Set forth below precise, complete statement of relief sought:

The taking of Judicial Notice of the filing of an Unfair Labor Practice

Charge in Case No. 03-CA-193649 for the fact of the filing not the truth of

the allegations contained therein.

OPPOSING PARTY: Novelis Corporation

OPPOSING ATTORNEY: Robert T. Dumbacher, Esquire

Hunton & Williams LLP; Bank of America Plaza, Suite 4100

600 Peachtree St., NE, Atlanta, GA 30308

404-888-4000; RDumbacher@hunton.com

MOVING PARTY: Intervenor USW

☐ Plaintiff
☐ Appellant/Petitioner

☐ Defendant
☐ Appellee/Respondent

OPPOSING PARTY: Employee Intervenors John Tesoriero,

Michael Malone, Richard Farrands & Andrew Duschen

MOVING ATTORNEY: Richard J. Brean

[name of attorney, with firm, address, phone number and e-mail]

United Steelworkers Legal Department

60 Boulevard of the Allies, Room 807, Pittsburgh, PA 15222-1214

412-562-2530; rbrean@usw.org

OPPOSING ATTORNEY: Thomas G. Eron, Esquire

Bond, Schoeneck & King, PLLC. One Lincoln Center

Syracuse, New York, 13202-1355

315-218-8000; Teron@bsk.com

Court/Judge/Agency appealed from: National Labor Relations Board, 364 NLRB No. 101 (2016)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain): _____

Opposing counsel's position on motion:

☐ Unopposed ☒ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☒ Yes ☐ No ☐ Don't Know

Is oral argument on motion requested?

☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date: _____

Signature of Moving Attorney:

Date: April 3, 2017

Service by:

☒

CM/ECF

☐

Other [Attach proof of service]

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this Court?

☐ Yes ☐ No

Requested return date and explanation of emergency: _____

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NOVELIS CORPORATION,)
)
Petitioner – Cross-Respondent,)
)
JOHN TESORIERO, MICHAEL MALONE,)
RICHARD FARRANDS AND ANDREW))
DUSCHEN,)
)
Intervenors,)
)
V.) Case No. 16-3076
) Case No. 16-3570
NATIONAL LABOR RELATIONS BOARD,)
)
Respondent-Cross-Petitioner,)
)
UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY, ALLIED)
INDUSTRIAL & SERVICE WORKERS)
INTERNATIONAL UNION, AFL-CIO,)
CLC,)
)
Intervenor)
)
)

INTERVENOR USW’S MOTION REQUESTING JUDICIAL NOTICE

1. Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27.1, Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service International Union, AFL-CIO, CLC

(“USW”) moves this Court to take judicial notice of the Unfair Labor Practice Charge filed by the USW and docketed by National Labor Relations Board, Region 3 (“Region”), on February 23, 2017, as Case Number 03-CA-193649 (“ULP Charge”). *See Decl. of Kenneth L. Wagner in Support of Intervenor’s Motion for Judicial Notice*, ¶¶ 2,3; Exs. A,B (“Wagner Declaration”) filed herewith.

2. Judicial notice may be originally taken on appeal. Fed. R. Evid. 201(f). (“Judicial notice may be taken at any stage of the proceeding.”) Judicial notice on appeal is particularly appropriate where, as here, the document proffered was not available at the prior stage of the proceedings. *See, e.g., Conopco, Inc. v. Roll, Int’l*, 231 F.3d 82, 86 (2d Cir. 2000) (original judicial notice taken on appeal of a final judgment and notice of appeal in a related action which occurred after district court granted motion to dismiss).

3. It is appropriate for a court to take judicial notice of an unfair labor practice charge filed with the National Labor Relations Board where the charge has bearing on the issue being considered on appeal. *See Gustafson v. Cornelius Co.*, 724 F.2d 75, 79-80 (8th Cir. 1983) (appropriate to take judicial notice of unfair labor practice charge filed by employee which demonstrated date on which employee’s cause of action against the union accrued). Here,

the ULP Charge is offered not for the truth of the assertions contained therein, but instead to show that the Union has alleged the recurrence of unfair labor practices committed by Petitioner – Cross-Respondent Novelis Corporation subsequent to the National Labor Relations Board (“Board”) decision which is currently before this Court.

3. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), the Supreme Court held that the Board, in its discretion, could consider the “likelihood of . . . recurrence in the future” of the employer’s unfair labor practices when deciding whether to issue a bargaining order. Second Circuit law also considers the repetition of unfair labor practices as one factor when determining the appropriateness of a bargaining order remedy. *See N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d 208, 215 (2d Cir. 1980).

4. Here, the ULP Charge alleges, in relevant part, that the Company violated §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) by discharging Union supporter Brian Wyman, a type of violation which is in part the basis for the bargaining order remedy ordered by the Board. To date the Region has made no determination as to the merits of the ULP Charge. *See: Wagner Declaration, ¶4.* USW will update this Court on any further developments with respect to the ULP Charge.

5. Based on the foregoing, the USW respectfully requests that this Court take judicial notice of the ULP Charge attached to the accompanying Declaration of Kenneth L. Wagner In Support of Intervenor USW's Motion Requesting Judicial Notice.

Dated: April 3, 2017

Respectfully submitted,

s/ Richard J. Brean

Counsel for Intervenor USW
General Counsel
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
and Service Workers International Union
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222
(412) 562-2530
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rbrean@usw.org

the Union and Petitioner-Cross-Respondent Novelis Corporation (“Company”).


2. On February 23, 2017, I filed an unfair labor practice charge (“ULP Charge”) on behalf of the Union against the Company with Region 3 of the National Labor Relations Board (“Region”). The ULP Charge alleges, in part, that the Company violated the National Labor Relations Act by unlawfully discriminating against known Union supporter Brian Wyman when it suspended him and then discharged him. A true and correct copy of the charge is attached hereto as the final page of Exhibit A.

3. On February 27, 2017, I received from the Region a letter addressed to Union Assistant General Counsel Katherine J. Shaw advising that the ULP Charge had been docketed as Case Number 03-CA-193649. A true and correct copy of this docketing letter is attached hereto as Exhibit B.

4. As of the date of this Declaration, the Region is conducting its investigation of the ULP Charge and has not yet made any determination as to its merits.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed this 29th day of March, 2017.


KENNETH L. WAGNER

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3012

DO NOT WRITE IN THIS SPACE

Case
03-CA-193649Date Filed
2/23/2017

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Novellis Corporation		b. Tel. No. (315) 349-0121
		c. Cell No.
		f. Fax No.
d. Address (Street, city, state, and ZIP code) 448 County Rte 1A, Oswego, NY 13126	e. Employer Representative	
	g. e-Mail	
	h. Number of workers employed 1300 (approx.)	
i. Type of Establishment (factory, mine, wholesaler, etc.) Factory	j. Identify principal product or service Aluminum	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections), (3) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices).
Since on or about December 15, 2016, the employer, by its officers, agents, and representatives, has:

a. discriminated in regard to hire or tenure of employment or a term or condition of employment to discourage membership in the United Steelworkers by suspending and then, on January 12, 2017, discharging known union supporter Brian Wyman; and

b. refused to bargain collectively with the United Steelworkers, the collective bargaining representative of the employer's employees in an appropriate bargaining unit, by suspending and then, on January 12, 2017, discharging known union supporter Brian Wyman, without providing notice and an opportunity to bargain concerning that discretionary discipline.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO

4a. Address (Street and number, city, state, and ZIP code) 60 Boulevard of the Allies, Room 807 Pittsburgh, PA 15222	4b. Tel. No. 412.562.2554
	4c. Cell No.
	4d. Fax No. 412.562.2429
	4e. e-Mail kshaw@usw.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Kenneth L. Wagner Kenneth L. Wagner, Esq.
(signature of representative or person making charge) (Print type name and title or office, if any)

Tel. No. 315.422.7111

Office, if any, Cell No.

Fax No. 315.471.2623

e-Mail
klwagner@bklawyers.com

Address Blitman & King LLP, 443 N. Franklin St, Syracuse, NY 13204

2/23/17
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

EXHIBIT

A



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlrb.gov
Telephone: (716)551-4931
Fax: (716)551-4972



Download
NLRB
Mobile App

February 23, 2017

Katharine J. Shaw, Assistant General Counsel
United Steel Paper & Forestry, Rubber, Manufacturing, Energy Allied Industrial & Service
Workers International Union, AFL-CIO/CLC
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222-1214

RECEIVED

FEB 27 2017

Re: Novelis Corporation
Case 03-CA-193649 BLITMAN & KING LLP

Dear Ms. Shaw:

The charge that you filed in this case on February 23, 2017 has been docketed as case number 03-CA-193649. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Examiner PATRICIA E. PETOCK whose telephone number is (716)398-7023. If this Board agent is not available, you may contact Assistant to the Regional Director Sandra L. Larkin whose telephone number is (716)398-7016.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing *Form NLRB-4701, Notice of Appearance*. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you



Novelis Corporation
Case 03-CA-193649

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February 23, 2017


fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website www.nlr.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website www.nlr.gov or from the Regional Office upon your request. *NLRB Form 4541, Investigative Procedures* offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul J. Murphy". The signature is fluid and cursive, with the first name "Paul" being more prominent.

PAUL J. MURPHY
Regional Director

cc: Kenneth L. Wagner, Esq.
Blitman & King, LLP
443 N. Franklin St Ste 300
Syracuse, NY 13204-5412

CERTIFICATE OF SERVICE

I, Richard J. Brean, do hereby certify that on April 3, 2017, an electronic copy of the Intervenor USW's Motion Requesting Judicial Notice and Declaration of Kenneth L. Wagner In Support of Intervenor USW's Motion Requesting Judicial Notice was filed with the Court via the CM/ECF system and that I have completed the service section in CM/ECF when filing said listing the following Filing Users:

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s/ Richard J. Brean
Richard J. Brean